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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Luis Gutierrez-Valencia,
10 Plaintiff,

No. CV 20-00376-PHX-JAT (DMF)

11 v.

ORDER

12 Charles L. Ryan, et al.,
13
14 Defendants.
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16 On February 18, 2020, Plaintiff Luis Gutierrez-Valencia, who is confined in the
17 Arizona State Prison Complex-Eyman in Florence, Arizona, filed a “Request for
18 Acceptance of Non-Authorized Forms and/or Complaint and/or Waivers Requests for
19 Plaintiff,” lodged a pro se civil rights Complaint, and filed an Application to Proceed In
20 Forma Pauperis. In a February 26, 2020 Order, the Court denied the Request for
21 Acceptance, granted the Application to Proceed, and gave Plaintiff thirty days to file a
22 complaint on a court-approved form.

23 On March 26, 2020, Plaintiff filed his Complaint. In an April 8, 2020 Order, the
24 Court dismissed the Complaint because it did not comply with Rule 8 of the Federal Rules
25 of Civil Procedure. The Court gave Plaintiff thirty days to file an amended complaint that
26 cured the deficiencies identified in the Order.¹

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28 ¹ In a May 19, 2020 Order, the Court denied Plaintiff’s May 7, 2020 Objection to
the Court’s April 8, 2020 Order.

1 Plaintiff requested and received an extension of time to file his first amended
 2 complaint. On May 28, 2020, Plaintiff filed a First Amended Complaint (Doc. 16). The
 3 Court will order Defendants Ryan, Shinn,² Pratt, and Corizon to answer Count One of the
 4 First Amended Complaint and will dismiss Defendant Smith and Count Two.

5 **I. Statutory Screening of Prisoner Complaints**

6 The Court is required to screen complaints brought by prisoners seeking relief
 7 against a governmental entity or an officer or an employee of a governmental entity. 28
 8 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 9 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 10 relief may be granted, or that seek monetary relief from a defendant who is immune from
 11 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

12 A pleading must contain a “short and plain statement of the claim *showing* that the
 13 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 14 not demand detailed factual allegations, “it demands more than an unadorned, the-
 15 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 16 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 17 conclusory statements, do not suffice.” *Id.*

18 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 19 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 20 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 21 that allows the court to draw the reasonable inference that the defendant is liable for the
 22 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 23 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 24 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
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 27 ² As to the claim against Defendant Ryan *in his official capacity only*, the Court will
 28 substitute the current Director of the Arizona Department of Corrections, David Shinn. *See*
 Fed. R. Civ. P. 25(d) (permitting the court to order substitution of a public officer who is a
 party in an official capacity when the party ceases to hold office while the action is
 pending).

1 allegations may be consistent with a constitutional claim, a court must assess whether there
2 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

3 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
4 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
5 (9th Cir. 2010). A “complaint [filed by a pro se prisoner] ‘must be held to less stringent
6 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
7 U.S. 89, 94 (2007) (per curiam)).

8 **II. First Amended Complaint**

9 In his two-count First Amended Complaint, Plaintiff sues Defendants Corizon,
10 Arizona Department of Corrections (ADC) former Director Charles L. Ryan, Deputy
11 Director Richard Pratt, and Assistant Facility Health Care Administrator M. Smith in their
12 individual and official capacities.

13 In **Count One**, Plaintiff alleges a violation of the Eighth Amendment prohibition
14 against cruel and unusual punishment relating to his medical care. Plaintiff claims he was
15 diagnosed in 2018 with inguinal and ventral hernias that were causing severe pain and other
16 complications, but he had to wait more than five months to obtain any sort of hernia
17 aids. (Doc. 16 at 3, 6-7.)³ He alleges the hernia aids he eventually received did not correct
18 his condition. (*Id.* at 7.) Plaintiff contends “the medical standard of care for a patient with
19 a symptomatic hernia is surgical repair as soon as possible after detection,” but a physician
20 told him that him that due to Defendant Corizon’s policy, Plaintiff would not get a hernia
21 surgery, regardless of his pain and other symptoms, because his hernias were reducible
22 and, therefore, surgery was elective. (*Id.* at 3, 7, 11.) The physician allegedly told Plaintiff
23 that unless there was an emergency, Plaintiff would have to wait until the hernias became
24 non-reducible or “breaks/bursts through the wall.” (*Id.* at 11.) Plaintiff contends he
25 subsequently saw another physician, who told Plaintiff that she would recommend a
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28 ³ The citation refers to the document and page number generated by the Court’s
Case Management/Electronic Case Filing system.

1 consultation with a hernia specialist even though Defendant Corizon “would more th[a]n
2 likely deny her request.” (*Id.*)

3 Plaintiff asserts that pursuant to Defendant Corizon’s policy, a hernia surgery is
4 considered elective if the hernia is reducible, regardless of whether a patient has other
5 symptoms or surgery will alleviate a serious medical need. (*Id.* at 6-7.) Plaintiff claims
6 that basing the decision to perform surgery on whether the hernia is reducible, irrespective
7 of other symptoms, falls far below the acceptable medical standard of care. (*Id.* at 7.)
8 Plaintiff claims Defendant Corizon’s policy prevented or delayed his surgery for almost
9 two years, during which he was in terrible pain, his condition worsened, his complications
10 and health risks increased, and his daily living was restricted. (*Id.* at 6-7, 11.) He alleges
11 that during this time, routine activities such as walking, running, lifting, coughing,
12 urinating, defecating, or sitting up “caused the tissue to bulge out of [his] abdom[inal] wall
13 and/or groin area[,] causing intense [and] excruciating pain.” (*Id.* at 7.) He also contends
14 “his stomach lin[ing] continued to rip both upper quadrant [and] right lower inguinal
15 hernias”; he had cramps, sharp pains, groin pain, a loss of sleep, and other complications;
16 his intestines “started going into his testicles”; and he had a bowel obstruction so severe
17 that an emergency medical Incident Command System was activated and he was taken to
18 the medical department on a stretcher. (*Id.* at 4, 7.)

19 Plaintiff contends Defendant Ryan had a non-delegable duty to provide
20 constitutionally adequate medical care to prisoners under his care, knew about Defendant
21 Corizon’s failure to provide adequate healthcare and its policy, but failed to act and allowed
22 Defendant Corizon’s misconduct to continue by repeatedly renewing Defendant Corizon’s
23 contract. (*Id.* at 3.) He alleges Defendant Ryan did this “because of a prison for profit
24 mentality [and] environment and [a] broken health care system within AD[C].” (*Id.*)
25 Plaintiff also claims he wrote to Defendant Ryan directly for help, it was within Defendant
26 Ryan’s power to help him, but Defendant Ryan failed to respond or act, despite the fact
27 that Plaintiff was suffering extreme pain and Defendant Ryan knew that delaying or failing
28 to provide the hernia surgeries would leave Plaintiff in excruciating pain and at risk for

1 serious complications. (*Id.* at 3-4.) Plaintiff asserts that because of Defendant Ryan's
2 inaction, he suffered daily as his condition worsened. (*Id.* at 4.)

3 Plaintiff contends Defendant Pratt also had a responsibility to provide adequate
4 medical care and to ensure Defendant Corizon's performance, and had the knowledge,
5 power, and authority to "correct the wrong," but failed to do so. (*Id.* at 4-5.) He claims
6 Defendant Pratt encouraged "wide-spread syst[e]mic failures" by continuing to renew
7 Defendant Corizon's contract despite knowing, since 2013, that Defendant Corizon was
8 failing to provide adequate medical care. (*Id.* at 5.) Plaintiff alleges Defendant Pratt
9 neglected prisoner medical care for monetary gain, claiming Defendant Pratt stated that
10 although he was not satisfied with Defendant Corizon's performance, he was afraid to lose
11 their business, he did not want to push Defendant Corizon too hard because he was
12 concerned Defendant Corizon might terminate its contract instead of providing adequate
13 medical care, and he felt it was a "smart business decision" to extend Defendant Corizon's
14 contract. (*Id.*)

15 Plaintiff claims Defendant Smith is responsible for processing, responding to, and
16 resolving informal complaints and grievances, and had the power to approve Plaintiff's
17 requested relief, but did not do so. (*Id.* at 8.) Plaintiff asserts that in a March 18, 2018
18 grievance response, Defendant Smith stated that based on current policy, hernia repair is
19 considered "elective" unless the hernias are non-reducible, extend into the scrotal sac, and
20 interfere with activities of daily living, and Plaintiff did not meet these criteria. (*Id.* at 8-9.)
21 Plaintiff contends this decision was made without Plaintiff being seen by Defendants and
22 without regard to Plaintiff's other symptoms and severe pain. (*Id.* at 9.)

23 Plaintiff claims he filed inmate letters and grievances and wrote to ADC's Central
24 Office. (*Id.* at 5.) He alleges Defendants "failed to correct the wrong" because they
25 delayed, denied, and failed to recommend, approve, or provide hernia surgery or a
26 consultation with a hernia specialist, without delay. (*Id.* at 8.) Plaintiff contends
27 Defendants, despite being aware of Plaintiff's symptoms, pain and suffering, and serious
28 medical needs, acted with deliberate indifference, disregarded Plaintiff's medical needs

1 and the physician's recommendation, relied on Defendant Corizon's unconstitutional
 2 policy, and decided not to provide a workable pain management plan or recommend a
 3 hernia consultation. (*Id.* at 4, 8.) He claims that as a result, he suffered with daily pain
 4 from a double hernia that interfered with his daily activities. (*Id.* at 8.)

5 Plaintiff alleges ADC and Corizon have a policy, practice, and custom of failing to
 6 provide adequate medical care, delaying or denying medical care, and acting with
 7 negligence because they will not provide consultations and surgery for inmates suffering
 8 from painful hernias, except in emergency situations, regardless of the inmate's severe
 9 daily pain. (*Id.* at 10.) Plaintiff claims these policies prevent medical professionals from
 10 exercising their medical judgment, which has resulted in the delay or denial of a hernia
 11 consultation, surgery, and special needs orders for Plaintiff. (*Id.*) He contends this left him
 12 in severe pain, placed him at risk of serious complications, and prevented him from
 13 participating in normal activities. (*Id.*)

14 Plaintiff contends Defendants allowed medical care to deteriorate so they could
 15 reduce their costs and increase their profits. (*Id.*) He alleges Defendants based their
 16 decisions on Defendant Corizon's policy and put Defendant Corizon's and ADC's needs
 17 and profits ahead of Plaintiff's medical needs, without regard to Plaintiff's symptoms, pain,
 18 and risk of serious medical complications. (*Id.* at 9.)

19 In **Count Two**, Plaintiff contends the same allegations discussed in Count One also
 20 constitute negligence and medical negligence in violation of the Ninth Amendment.

21 In his Request for Relief, Plaintiff seeks declaratory and injunctive relief, monetary
 22 damages, and his costs of suit.

23 **III. Discussion**

24 The Court will dismiss Count Two because it is essentially duplicative of Plaintiff's
 25 better-pleaded allegations in Count One and because the Ninth Amendment "has never
 26 been recognized as independently securing any constitutional right, for purposes of
 27 pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir.
 28 1986).

1 The Court will dismiss Defendant Smith because Plaintiff's claim against Defendant
 2 Smith is duplicative of his claim against her in *Gutierrez-Valencia v. Corizon Utilization*
 3 *Management Unit*, CV 18-03007-PHX-JAT (DMF).⁴ An in forma pauperis complaint that
 4 merely repeats pending or previously litigated claims may be considered abusive and
 5 dismissed under the authority of 28 U.S.C. § 1915(e). *Cato v. United States*, 70 F.3d 1103,
 6 1105 n.2 (9th Cir. 1995); *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988).

7 Liberally construed, Plaintiff has stated an Eighth Amendment medical care claim
 8 in Count One against the remaining Defendants. The Court will require Defendant Corizon
 9 to answer Count One; require Defendant Pratt to answer Count One in his individual
 10 capacity only;⁵ require Defendant Ryan to answer Count One in his individual capacity
 11 only; and substitute current Arizona Department of Corrections Director David Shinn for
 12 Defendant Ryan in his official capacity only and require Director Shinn to answer Count
 13 One in his official capacity.⁶ See Fed. R. Civ. P. 25(d) (permitting the court to order
 14 substitution of a public officer who is a party in an official capacity when the party ceases
 15 to hold office while the action is pending).

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 17 ⁴ In Count Five of his Complaint in CV 18-03007, Plaintiff alleged that "throughout
 18 [Plaintiff's] entire medical jou[r]ney," Defendant Smith "has continued to hinder [Plaintiff]
 19 from securing a much[-]needed surgical procedure for a double hernia condition," despite
 20 being aware of Plaintiff's condition and pain. See Doc. 1 at 9 in CV 18-03007. Plaintiff
 21 claimed Defendant Smith refused to aid or assist in remedying Plaintiff's condition and
 22 deliberately "refuse[d] to offer any real resolution" of the issue, despite Plaintiff's
 23 "constant cr[ie]s for assistance." *Id.* In a November 30, 2018 Order, the Court dismissed
 24 the claim against Defendant Smith because Plaintiff had failed to state a claim against her.
 25 See Doc. 11 in CV 18-03007.

26 ⁵ The Court will not require Defendant Pratt to answer in his official capacity
 27 because it would be redundant; the Court is already requiring Director Shinn to answer in
 28 his official capacity. See *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690
 n.55 (1978) (a claim against an individual in his or her official capacity is "only another
 way of pleading an action against an entity of which an officer is an agent.").

⁶ Plaintiff can only obtain *prospective* declaratory or injunctive relief, not damages
 or retrospective declaratory and injunctive relief against ADC employees in their official
 capacities. See *Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("State officials sued for damages
 in their official capacity are not 'persons' for purposes of the suit because they assume the
 identity of the government that employs them."); *Coal. to Defend Affirmative Action v.*
Brown, 674 F.3d 1128, 1134 (9th Cir. 2012) (the Eleventh Amendment "does not . . . bar
 actions for prospective declaratory or injunctive relief against state officers in their official
 capacities for their alleged violations of federal law.").

1 **IV. Warnings**

2 **A. Release**

3 If Plaintiff is released while this case remains pending, and the filing fee has not
4 been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court
5 that he intends to pay the unpaid balance of his filing fee within 120 days of his release or
6 (2) file a non-prisoner application to proceed in forma pauperis. Failure to comply may
7 result in dismissal of this action.

8 **B. Address Changes**

9 Plaintiff must file and serve a notice of a change of address in accordance with Rule
10 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
11 relief with a notice of change of address. Failure to comply may result in dismissal of this
12 action.

13 **C. Copies**

14 Because Plaintiff is currently confined in an Arizona Department of Corrections unit
15 subject to General Order 14-17, Plaintiff is not required to serve Defendants with a copy
16 of every document he files or to submit an additional copy of every filing for use by the
17 Court, as would ordinarily be required by Federal Rule of Civil Procedure 5 and Local Rule
18 of Civil Procedure 5.4. Plaintiff may comply with Federal Rule of Civil Procedure 5(d) by
19 including, with every document he files, a certificate of service stating that this case is
20 subject to General Order 14-17 and indicating the date the document was delivered to
21 prison officials for filing with the Court.

22 **If** Plaintiff is transferred to a unit other than one subject to General Order 14-17, he
23 will be required to: (a) serve Defendants, or counsel if an appearance has been entered, a
24 copy of every document that he files, and include a certificate stating that a copy of the
25 filing was served; and (b) submit an additional copy of every filing for use by the Court.
26 *See* Fed. R. Civ. P. 5(a) and (d); LRCiv 5.4. Failure to comply may result in the filing
27 being stricken without further notice to Plaintiff.

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1 **D. Possible Dismissal**

2 If Plaintiff fails to timely comply with every provision of this Order, including these
3 warnings, the Court may dismiss this action without further notice. *See Ferdik v. Bonzelet*,
4 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure
5 to comply with any order of the Court).

6 **IT IS ORDERED:**

7 (1) The Clerk of Court shall update the docket to reflect that, pursuant to Rule
8 25(d) of the Federal Rules of Civil Procedure, Arizona Department of Corrections Director
9 David Shinn is substituted for Charles Ryan **in his official capacity only**.

10 (2) Count Two and Defendant Smith are **dismissed** without prejudice.

11 (3) Defendants Ryan, Shinn, Pratt, and Corizon must answer Count One.
12 Defendants Ryan and Pratt must answer in their individual capacities only; Defendant
13 Shinn must answer in his official capacity only.

14 (4) The Clerk of Court must send Plaintiff this Order, and a copy of the
15 Marshal's Process Receipt & Return form (USM-285) and Notice of Lawsuit & Request
16 for Waiver of Service of Summons form for Defendants Ryan, Shinn, Pratt, and Corizon.

17 (5) Plaintiff must complete⁷ and return the service packet to the Clerk of Court
18 within 21 days of the date of filing of this Order. The United States Marshal will not
19 provide service of process if Plaintiff fails to comply with this Order.

20 (6) If Plaintiff does not either obtain a waiver of service of the summons or
21 complete service of the Summons and First Amended Complaint on a Defendant within 90
22 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever
23 is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m);
24 LRCiv 16.2(b)(2)(B)(ii).

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27 ⁷ If a Defendant is an officer or employee of the Arizona Department of Corrections,
28 Plaintiff must list the address of the specific institution where the officer or employee works. Service cannot be effected on an officer or employee at the Central Office of the Arizona Department of Corrections unless the officer or employee works there.

1 (7) The United States Marshal must retain the Summons, a copy of the First
2 Amended Complaint, and a copy of this Order for future use.

3 (8) The United States Marshal must notify Defendants of the commencement of
4 this action and request waiver of service of the summons pursuant to Rule 4(d) of the
5 Federal Rules of Civil Procedure. The notice to Defendants must include a copy of this
6 Order.

7 (9) A Defendant who agrees to waive service of the Summons and First
8 Amended Complaint must return the signed waiver forms to the United States Marshal, not
9 the Plaintiff, **within 30 days of the date of the notice and request for waiver of service**
10 pursuant to Federal Rule of Civil Procedure 4(d)(1)(F) to avoid being charged the cost of
11 personal service.

12 (10) The Marshal must immediately file signed waivers of service of the
13 summons. If a waiver of service of summons is returned as undeliverable or is not returned
14 by a Defendant within 30 days from the date the request for waiver was sent by the Marshal,
15 the Marshal must:

16 (a) personally serve copies of the Summons, First Amended Complaint,
17 and this Order upon Defendant pursuant to Rule 4(e)(2) and/or (h)(1) of the Federal
18 Rules of Civil Procedure; and

19 (b) within 10 days after personal service is effected, file the return of
20 service for Defendant, along with evidence of the attempt to secure a waiver of
21 service of the summons and of the costs subsequently incurred in effecting service
22 upon Defendant. The costs of service must be enumerated on the return of service
23 form (USM-285) and must include the costs incurred by the Marshal for
24 photocopying additional copies of the Summons, First Amended Complaint, or this
25 Order and for preparing new process receipt and return forms (USM-285), if
26 required. Costs of service will be taxed against the personally served Defendant
27 pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise
28 ordered by the Court.

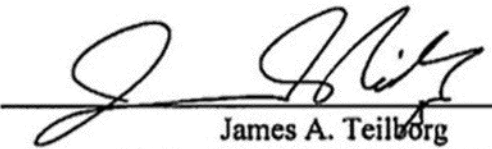
1 (11) Defendants Ryan, Shinn, Pratt, and Corizon must answer Count One of the
2 First Amended Complaint or otherwise respond by appropriate motion within the time
3 provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

4 (12) Any answer or response must state the specific Defendant by name on whose
5 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
6 does not identify the specific Defendant by name on whose behalf it is filed.

7 (13) This matter is referred to Magistrate Judge Deborah M. Fine pursuant to
8 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
9 authorized under 28 U.S.C. § 636(b)(1).

10 Dated this 23rd day of June, 2020.

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James A. Teilborg
Senior United States District Judge